LEGAL MEMORANDUM

A Constitutional Analysis of Proposals to Disallow Tax Deductions for Tobacco Product Advertising Expenses

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The analysis presented in this memorandum would apply to federal legislation discriminating against advertising for any product—not just legislation discriminating against tobacco product advertising

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On February 3, 1987, Senator Bradley introduced a bill (S. 446) that, if enacted, would disallow tax deductions "for any amount paid or incurred to advertise any tobacco products." On March 11, 1987, Representative Stark introduced a similar bill (H.R. 1563) that would go even further, prohibiting deductions not simply for tobacco product advertising but for *any* communications "informing or influencing the general public (or any segment thereof) with respect to tobacco and tobacco products." Each bill is identical to legislation introduced by Senator Bradley and Representative Stark in the last Congress (S. 1950 and H.R. 3950).

Senator Bradley has stated that the purpose of his bill is to assure that, when it comes to the use of tobacco products, "the Government [will] speak with one voice," a voice that will "unequivocally say, 'smoking will harm you.' " [1] Representative Stark has stated that his intention is to "significantly decrease" or "end" advertising of tobacco products.[2] Both bills thus seek to suppress disfavored speech through the

[1] 133 Cong. Rec. S1617 (daily ed. Feb. 3, 1987); 131 Cong. Rec. S17,696 (daily ed. Dec. 16, 1985).

[2] 133 Cong. Rec. E893 (daily ed. March 11, 1987); 131 Cong. Rec. H12,203 (daily ed. Dec. 16, 1985).

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tax system, by making such speech inordinately expensive.[3]

As attempts to suppress truthful speech proposing the sale of a lawful product, the Bradley/Stark proposals would likely be held unconstitutional under the test outlined by the Supreme Court in the *Central Hudson* case and reaffirmed in *Posadas*. Restrictions on commercial speech cannot be sustained unless, among other things, they "directly advance" a substantial governmental interest and that interest cannot be served by any "less restrictive" means. It is unlikely that the Bradley/Stark proposals could satisfy either of those elements of the governing *Central Hudson* test.

The fact that Senator Bradley and Representative Stark have chosen the tax system to achieve their goal is irrelevant under the First Amendment. As the

[3] The Bradley/Stark proposals are only the latest in a series of attempts to use the tax code to penalize disfavored speech or to use a tax on speech as an instrument of social policy. In the last Congress, Representative Stark also introduced legislation (H.R. 1444) to ban tax deductions for arms-sale promotion expenses, and Representative George Brown introduced legislation (H.R. 2657) to ban tax deductions for alcoholic-beverage advertising expenses.

In the current Congress, Representative Donnelly on June 4, 1987, introduced a bill (H.R. 2606) that would disallow tax deductions for advertising of tobacco products *and* alcoholic beverages. Representative Donnelly has stated that advertising for these products should not receive the tax "subsidy" available to advertising for other products. 133 Cong. Rec. H4202 (daily ed. June 4, 1987). In addition, Representative Collins has introduced legislation (H.R. 332) to disallow advertising expense deductions to persons who discriminate in their advertising practices on the basis of race, color or ethnic background.

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President of the American Bar Association, Eugene C. Thomas, has stated, "there's a serious legal problem * * * to the use of [the] tax code for social engineering."[4] Neither can the Bradley/Stark proposals be saved, as both legislators have suggested, by characterizing the disallowance of tax deductions for tobacco product advertising as the removal of a federal "subsidy." Whatever may be said of that characterization, the fact is that both proposals would single out one form of speech and—because of its content—attempt to stamp it out. That is precisely what the First Amendment forbids.

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We first review the Supreme Court's decisions establishing that Congress may not use the tax system to burden or inhibit disfavored speech. We then assess the Bradley/Stark proposals under the First Amendment test for legislation that would ban or restrict commercial speech.[5]

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[4] Interview, *Advertising Age*, Feb. 23, 1987, p. 80.

[5] To the extent that the Stark bill would disallow deductions for *any* communications "informing or influencing the general public (or any segment thereof) with respect to tobacco and tobacco products," it would burden noncommercial as well as commercial speech on the basis of its content. *See, e.g., Consolidated Edison Co.* v. *PSC*, 447 U.S. 530 (1980). No discussion is required to demonstrate that such a burden on noncommercial speech would violate the First Amendment.

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I. CONGRESS MAY NOT USE THE TAX SYSTEM TO BURDEN OR INHIBIT DISFAVORED SPEECH

A. The First Amendment Forbids Congress To Exercise the Taxing Power Discriminatorily

Under the First Amendment, the fact that Senator Bradley and Representative Stark have chosen to use the tax system to suppress tobacco-related speech, rather than attempt to achieve that goal more directly, is irrelevant. The Supreme Court has long recognized that "speech can be effectively limited by the exercise of the taxing power" (*Speiser* v. *Randall*, 357 U.S. 513, 518 (1958))—just as it can be limited by more direct types of regulation. Indeed, in a celebrated case decided a half-century ago, the Supreme Court identified "taxes on knowledge" as one of the primary evils the First Amendment was designed to guard against.

The Court was confronted in that case—*Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936)—with a Louisiana tax on large-circulation periodicals imposed to punish critics of Governor Huey Long. The Court invalidated the tax because, like the proposed disallowance of deductions for tobacco product advertising, it was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled." *Id.* at 250. Like the Bradley/Stark proposals, it also was aimed at the suppression of disfavored speech. *See Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). *See also Arkansas Writers' Project, Inc.* v. *Ragland*, 107 S. Ct. 1722, 1726-28 (1987).

The Supreme Court has twice upheld measures disallowing tax deductions for lobbying expenses pre-

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cisely because Congress had *not* discriminated invidiously in such a way as to "aim at the suppression" of disfavored ideas. In *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), the Court rejected a challenge to provisions of the Internal Revenue Code making contributions to nonprofit lobbying groups nondeductible, while permitting deductions for contributions to veterans' lobbying groups. The Court rejected the challenge on the ground that there was "no indication that the statute was intended to suppress any ideas or that it has had that effect." *Id.* at 548.

Similarly, in *Cammarano* v. *United States*, 358 U.S. 498 (1959), the Court upheld a provision of the Internal Revenue Code that disallowed deductions for lobbying by business entities. It upheld the provision because the disallowance for lobbying expense deductions by business groups, which mirrored the treatment of nonprofit groups, was viewpoint-neutral. The statute expressed a uniform determination by Congress that "everyone in the community should stand on the same footing * * * so far as the Treasury of the United States is concerned." *Id.* at 513.

The Bradley/Stark proposals obviously would not leave tobacco product manufacturers "on the same footing" as other advertisers. Both proposals target tobacco product advertising for adverse treatment, and they do so in order to produce "a significant coercive effect." *See Arkansas Writers' Project*, 107 S. Ct. at 1731 (Scalia, J., joined by Rehnquist, C.J., dissenting). Both proposals are "frankly aimed" at suppressing the speech of tobacco product manufacturers because of the content of that speech (*see American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950))—a result that requires extraor-

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dinary justification under the First Amendment regardless of the means chosen to achieve it.[6]

B. The Bradley/Stark Proposals Cannot Be Rationalized as a Mere Refusal To "Subsidize" Speech

Even if the stated aim of the Bradley/Stark proposals were not to "decrease" or "end" tobacco product advertising but simply to assure that the government shall no longer "subsidize" a message with which it disagrees—as Senator Bradley has suggested (133 Cong. Rec. S1616 (daily ed. Feb. 3, 1987))—the proposals would violate the First Amendment.

The "subsidy" justification offered by Senator Bradley is misconceived for two reasons. First, it incorrectly portrays the deduction for advertising expenses as a means by which the government subsidizes speech. In fact, our tax system is based on the premise that only net income should be taxed, with deductions being permitted for costs reasonably incurred in producing that income. The deduction for advertising expenses—like deductions for other ordinary business expenses—simply implements the net income concept. It no more provides a "subsidy" for advertising than the deduction for payroll expenses provides a "subsidy" for the hiring of workers. Ex-

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[6] In *Arkansas Writers' Project*, the Court this April invalidated as impermissibly discriminatory under the First Amendment a state statute that taxed general-interest magazines but exempted newspapers and religious, professional, trade, and sports journals. Although they disagreed with the Court's decision, Chief Justice Rehnquist and Justice Scalia agreed that denial of participation in a system of tax exemptions *would* infringe the First Amendment if the denial were designed to produce, or did produce, "a significant coercive effect"—*i.e.*, an inhibition of speech. 107 S. Ct. at 1731.

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pense deductions can be viewed as a "subsidy" only if one is prepared to label every decision not to impose a particular type of tax as a "subsidy."

Second, even if the advertising expense deduction could legitimately be viewed as a government subsidy, that would not free the government to dole it out to speakers with government-approved messages while denying it to speakers with messages that the government does not like. It is settled, for example, that the government may not restrict expression in public places—for example, public streets and parks, or public libraries and universities—in a discriminatory manner. Each of those "public forums" exists because of a government subsidy. Yet, the Supreme Court has held repeatedly that the government cannot grant or withhold access to such forums—which may be said to constitute a "subsidy in kind" (M. Yudof, *When Government Speaks* 234 (1983))—on the basis of the speaker's message.[7]

Similarly, it is clear that the government may not limit use of the mail system to only those messages that the government favors—even though the public mail service constitutes a direct public subsidy for private communication. *See U.S. Postal Service* v.

[7] *E.g., Cornelius* v. *NAACP Legal Defense & Educational Fund,* 105 S. Ct. 3439, 3449-50, 3454-55 (1985); *Perry Education Ass'n* v. *Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983). *See also Board of Education* v. *Pico,* 457 U.S. 853, 869-72 (1982) (plurality opinion). The nation's airwaves are another example of a public resource that plainly cannot be allocated on the basis of a speaker's viewpoint. *See generally FCC* v. *League of Women Voters,* 468 U.S. 364, 376-81 (1984); *CBS* v. *Democratic Nat'l Committee,* 412 U.S. 94, 162-63 (1973) (Douglas, J., concurring); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390-91, 396 (1969); *NBC* v. *United States,* 319 U.S. 190, 226-27 (1943).

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Council of Greenburgh Civic Assn's, 453 U.S. 114, 141 (1981) (White, J., concurring); *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring); *United States* v. *Van Leeuwen*, 397 U.S. 249, 251-52 (1970). In fact, the Supreme Court has ruled specifically that the government, having made second-class postal rates generally applicable to periodical publications, cannot withhold that subsidy from a disfavored magazine. *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156 (1946).

If the government must make these "subsidies" available on a content-neutral basis, it plainly also must make the advertising expense deduction available on a content-neutral basis. The government may not have been required to provide the "subsidy" in the first place. But once it has done so, the prohibition against content-based exclusions comes into play. *See, e.g., Perry*, 460 U.S. at 45-46.[8] Congress may no more deny particular advertisers the advertising expense deduction on the basis of their message than it may deny them the use of the mails or require them to pay uniquely high mailing rates.[9]

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[8] *Compare Blount* v. *Rizzi*, 400 U.S. 410, 416 (1971) (" 'The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.' ") (quoting *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting)).

[9] The Supreme Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), confirms this conclusion. The Court in that case sustained Congress's decision to provide more generous funding to major party candidates than to minor party or independent candidates. But the public financing scheme at issue in *Buckley* did not discriminate among parties or candidates on the basis of their views. *See id.* at 95-97.

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C. The Government's Purported Interest in "Speaking With One Voice" Cannot Justify the Bradley/Stark Proposals

Senator Bradley also has suggested that deductions for tobacco product advertising expenses should be disallowed because, when it comes to those products, "the Government should speak with one voice"—a voice that, according to Senator Bradley, "should unequivocally say, 'smoking will harm you.' " 133 Cong. Rec. S1616 (daily ed. Feb. 3, 1987). But Senator Bradley overlooks the critical distinction "between governmental promotion of the system of freedom of expression and governmental participation in the system." Emerson, *The Affirmative Side of the First Amendment*, 15 Ga. L. Rev. 795, 799 (1981). In allowing deductions for advertising expenses, the government may be facilitating expression by private groups but it has not stamped that expression with its own imprimatur. It misses the mark to suggest, as Senator Bradley has, that allowing such deductions signals governmental support.[10]

Under Senator Bradley's rationale, the federal government, having chosen to pursue any policy—say, farm price supports or school lunch subsidies—could disallow advertising expense deductions for those opposing that policy. Having chosen to encourage childbirth over abortion through Medicaid reimbursement and other policies, it could deprive pro-choice groups of their tax-exempt status, and then

[10] *See Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981) (public university, in allowing private groups to use campus facilities, "does not confer any imprimatur of state approval" on those groups); *Walz* v. *Tax Commission*, 397 U.S. 664, 675 (1970) (church property-tax exemption is not state "sponsorship" of religion).

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disallow deductions by such groups for advertising expenses. Having decided to oppose busing as a remedy for school segregation, it could follow the same course with organizations promoting the use of that remedy. Each of those results is implicit in Senator Bradley's innocuous-sounding defense of his bill. With justifiable irony, ABA President Eugene Thomas has commented: "I don't mind that principle if you let me apply it to all the things I dislike. But if you want to apply it to the things you dislike, then I'm worried." [11]

The Bradley/Stark proposals are, in this connection, altogether different from the legislation upheld

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[11] Interview, *Advertising Age*, Feb. 23, 1987, p. 80. As noted above, legislation was introduced in the last Congress to ban tax deductions for advertising of alcoholic beverages. In support of that legislation, Representative Brown used the same "subsidy" argument advanced here by Senator Bradley and Representative Stark. He also asserted that "alcohol is America's No. 1 drug problem" (*see* 131 Cong. Rec. E2524 (daily ed. June 4, 1985)), just as Senator Bradley has stated that "[t]obacco is the biggest health hazard facing this country." 133 Cong. Rec. S1616 (daily ed. Feb. 3, 1987).

In the last Congress, Senator Humphrey proposed an amendment to the Internal Revenue Code (S. 2382) to deny tax benefits (exempt status and contribution deductions) to hospitals and other institutions, otherwise tax-exempt, that perform, finance, or provide facilities for abortion. An extraordinarily broad group of distinguished tax lawyers, professors, and former government officials condemned the proposal on the ground that it "runs directly counter to the salutary concept of tax neutrality." Letter to All Senators from Tax Professionals, July 22, 1986. In their view, "federal regulatory intervention through the Internal Revenue Code would be bad for the tax system and contrary to the national interest." Senator Humphrey has reintroduced his bill in the current Congress as S. 264.

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by the Supreme Court in *Harris* v. *McRae*, 448 U.S. 297 (1980). There the Court sustained against equal protection challenge Congress's decision to offer reimbursement through Medicaid for childbirth but not abortion expenses. But there was no evidence in *McRae* that Congress was attempting to frustrate the right of women to terminate a pregnancy by abortion. *See id.* at 317 n.19. And regardless of whether the equal protection guarantee limits the government's power to manipulate the exercise of fundamental rights, the requirement that it not regulate *speech* in ways that favor some viewpoints or ideas over others is independently grounded in the First Amendment. The Court's suggestion in *Regan* v. *Taxation with Representation*, 461 U.S. at 548, that it would invalidate a tax discriminating among groups on the basis of their views confirms that its approach in *McRae* is inapplicable where First Amendment rights are at issue.[12]

* * * *

In sum, the means chosen in the Bradley/Stark bills to curtail speech, manipulation of the tax system, does not affect the bills' status under the First Amendment. The protections of the First Amendment do not depend upon the sophistication of the means chosen to accomplish an impermissible result.

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[12] Three of the dissenters in *McRae* foreshadowed this when they observed:

> "Surely the Government could not provide free transportation to the polling booths only for those citizens who vote for Democratic candidates, even though the failure to provide the same benefit to Republicans 'represents simply a refusal to subsidize certain protected conduct.' " 448 U.S. at 336 n.6 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting).

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II. THE FIRST AMENDMENT LIMITS CONGRESS'S POWER TO BURDEN OR INHIBIT COMMERCIAL SPEECH

Since the Bradley/Stark proposals would trigger First Amendment scrutiny as an attempt to curtail commercial speech, the proposals would be subject to analysis under the Supreme Court's governing test for restrictions on such speech.

A. Development of the Commercial Speech Doctrine

Before 1976, commercial speech was considered by the courts to be outside the ambit of the First Amendment. Then, in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Supreme Court announced a new principle—truthful speech proposing lawful commercial transactions is protected by the First Amendment.[13] Since then, it has applied the principle to invalidate a wide variety of restrictions on commercial speech.[14]

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[13] Applying the principle in that case, the Supreme Court invalidated a state law forbidding licensed pharmacists to advertise the prices of prescription drugs. This decision was foreshadowed by the Court's holding in *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), that a state may not forbid advertisements announcing the availability of legal abortions.

[14] The Court has invalidated a township ordinance forbidding the posting of "For Sale" and "Sold" signs in residential neighborhoods to stem "white flight" (*Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977)); to strike down a state law banning the advertising and display of contraceptives (*Carey* v. *Population Services International*, 431 U.S. 678 (1977)) and a federal law forbidding the mailing of unsolicited advertisements for contraceptives (*Bolger* v. *Youngs Drug Products*, 463 U.S. 60 (1983)); to invalidate various state-law restrictions on advertising by lawyers

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In two cases, the Court has sustained, or indicated that it would sustain, laws that limit the media through which advertisers may promote their products.[15] But in upholding such restrictions, the Court placed great weight on the fact that they applied to *all* speakers, regardless of their message; it was the medium, not the message, that gave offense.[16] In no case since 1976—except in the recent *Posadas* case[17]—has the Court approved a restriction on commercial speech "unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."[18]

Before further discussion of *Posadas*, however, it may be well to understand the two core values that led the Court to extend the First Amendment's protections to commercial speech, and to review the prevailing First Amendment test for restrictions on commercial speech, which *Posadas* reaffirmed.

(*Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates* v. *State Bar*, 433 U.S. 350 (1977)); and to disapprove a state public service commission regulation banning promotional advertising by electric utilities (*Central Hudson Gas & Electric Co.* v. *PSC*, 447 U.S. 557 (1980)). *See also Lowe* v. *SEC*, 472 U.S. 181, 234-36 (1985) (White, J., joined by Burger, C.J., and Rehnquist, J., concurring) (investment advice newsletter).

[15] *City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981).

[16] *Taxpayers for Vincent*, 466 U.S. at 804-05; *Metromedia, Inc.*, 453 U.S. at 505-12.

[17] *Posadas* v. *Tourism Company of Puerto Rico*, 106 S. Ct. 2968 (1986).

[18] *Central Hudson*, 447 U.S. at 566 n.9.

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First, we live in a society that does not tolerate information rationing by government—government attempts to manipulate our behavior by curtailing our access to information and ideas.[19] Whether the speech involved is "commercial" or "noncommercial" in nature, the First Amendment condemns paternalistic efforts by government to advance our welfare by keeping us in the dark, shielding us from viewpoints with which it disagrees and from information that it does not like. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." [20]

Second, "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." [21]

> "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Virginia State Board of Pharmacy*, 425 U.S. at 765.

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[19] *Central Hudson*, 447 U.S. at 578 (concurring opinion). *See Linmark*, 431 U.S. at 96; *Carey*, 431 U.S. at 701; *Metromedia*, 453 U.S. at 505; *Bolger*, 463 U.S. at 79 (Rehnquist, J., joined by O'Connor, J., concurring in judgment).

[20] *See Virginia State Board of Pharmacy*, 425 U.S. at 770.

[21] *Bates*, 443 U.S. at 364.

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Because these twin values—one political, the other economic—are so fundamental to our system, the Supreme Court has not hesitated to invalidate restrictions on commercial speech even when the asserted justification for the restriction was substantial.[22] *Posadas* indicates that not every commercial speech restriction interfering with these First Amendment values automatically will be invalidated on that basis. But nothing in *Posadas* reasonably can be interpreted as signaling the Court's rejection of those basic values —or as permitting a legislature or reviewing court to ignore them in considering restrictions on speech.

B. The Invalidity of the Bradley/Stark Proposals Under *Central Hudson*

Reaffirming its commitment to the core values that underlie the First Amendment protection afforded commercial speech, the Court in *Central Hudson* articulated a four-part test for assessing the validity of restrictions on such speech:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

It is clear that tobacco product advertising concerns a lawful activity—an activity that has been

[22] *E.g., Linmark,* 431 U.S. at 94; *Central Hudson,* 447 U.S. at 571.

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lawful throughout the country for many years (unlike casino gambling or prostitution). Likewise, such advertising is not inherently misleading.[23] Thus, tobacco product advertising qualifies for protection under the first prong of the *Central Hudson* test. Assuming for purposes of this discussion (and only for purposes of this discussion) that the Bradley/Stark proposals aim to serve a "substantial" government purpose—the second prong of *Central Hudson*—the proposals still could not survive a First Amendment challenge because they would not satisfy the other two elements of the *Central Hudson* test.

1. *The Proposals Are Unlikely To Achieve Their Stated Purpose*

The suppression of advertising sought by Senator Bradley and Representative Stark would not "directly advance" the asserted governmental interest—curtailing the use of tobacco products.

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[23] Senator Bradley has suggested that cigarette advertising may be deceptive by virtue of the themes and images it employs (133 Cong. Rec. S1616 (daily ed. Feb. 3, 1987)), but the Tenth and Fifth Circuit Courts of Appeals have rejected a comparable justification for bans on liquor advertising. *Oklahoma Telecasters Association* v. *Crisp*, 699 F.2d 490, 500 & n.9 (10th Cir. 1983), *rev'd on other grounds*, 467 U.S. 691 (1984); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984). Significantly, the FTC has emphasized that "it is in the public interest to promote the dissemination of truthful information concerning cigarettes which may be material and desired by the consuming public." *FTC Cigarette Advertising Guides*, 4 Trade Reg. Rep. (CCH) ¶ 39,012.70, p. 41,603. Section 5 of the FTC Act, 15 U.S.C. § 45, forbids "false" or "deceptive" commercial acts or practices, and the FTC is empowered to pursue those who violate that prohibition.

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The available evidence indicates that advertising expenditures do not significantly affect large, mature consumer markets other than at the brand level. The evidence also shows that tobacco advertising serves primarily as a vehicle for intense interbrand rivalry. The avowed purpose and demonstrated effect of such advertising is to prompt people who already smoke to shift brands, or to remain loyal to the brand being advertised, rather than to attract new smokers.[24] In its 1987 Annual Report to the President, the Council of Economic Advisors stated:

> "There is little evidence that advertising results in additional smoking. As with many products,

[24] *E.g.*, M.J. Waterson, *Advertising and Cigarette Consumption* 12-14 (1983). Reviewing the literature in 1971, Judge Skelly Wright stated: "While cigarette advertising is apparently quite effective in inducing brand loyalty, it seems to have little impact on whether people in fact smoke." *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582, 588 (D.D.C. 1971) (3-judge court) (dissenting opinion) (footnote omitted), *aff'd mem.*, 405 U.S. 1000 (1972). The Surgeon General, in a 1979 report, agreed that "the major action of cigarette advertising now seems to be to shift brand preferences, to alter market share for a particular brand." *Smoking & Health: A Report of the Surgeon General* 18-23 (1979).

Extensive expert testimony to the same effect was presented in congressional subcommittee hearings in August 1986. *Advertising of Tobacco Products: Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 640, 708, 666, 811 (1986) ("1986 Hearings") (statements of Dr. J.J. Boddewyn, Dr. Roger D. Blackwell, Dr. Scott Ward, and Michael J. Waterson). *See also Advertising of Tobacco Products: Hearing before the Subcommittee on Transportation, Tourism and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987) ("April 1987 Hearing") (statement of Howard H. Bell, President, American Advertising Federation).

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advertising mainly shifts consumers among brands." [25]

In fact, tobacco product consumption actually has increased in most countries in which cigarette advertising has been banned.[26]

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[25] *Economic Report of the President* 186 (1987).

[26] Waterson, *supra*, at 17-18; Int'l Advertising Ass'n, *Tobacco Advertising Bans and Consumption in 16 Countries* (J. Boddewyn 2d ed. 1986). *See also Economic Report of the President, supra*, at 186 ("Evidence from other countries suggests that banning tobacco advertising has not discouraged smoking."). Noting this fact, FTC Chairman Daniel Oliver has testified in Congress that an advertising ban is unlikely to reduce tobacco consumption. *April 1987 Hearing, supra*, Tr. 15-16. *See also* "FTC Chief Opposes Ad Limits," *Advertising Age*, Nov. 17, 1986, p. 103 (interview with Daniel Oliver). Elizabeth Whelan of the American Council on Science and Health—an outspoken opponent of the tobacco industry—likewise has stated that an advertising ban would "probably not" reduce cigarette consumption in this country. Whelan, "Second Thoughts on a Cigarette-Ad Ban," *Wall St. J.*, Dec. 18, 1985, at 28, col. 6.

Proponents of tobacco product advertising restrictions claim that in both Norway and Sweden there are fewer persons using tobacco now than when those countries allowed tobacco product advertising. But the incidence of smoking among adults overall had begun to decline in Norway *before* advertising was banned in 1975, and stabilized *after* the ban was imposed. In Sweden, cigarette advertising has not been completely banned, and in any event the incidence of smoking among adults also had begun to decline before special restrictions were imposed in 1979. As in Norway, the decline in smoking among adults in Sweden was more pronounced before special advertising restrictions were imposed than afterward. *Tobacco Advertising Bans, supra*, at 22, 28. In 1984, nine years after the advertising ban was imposed in Norway, the proportion of all adult smokers in that country (42 percent) was still more than *one-third higher* than the proportion of all adult smokers in the United States (about 31 percent).

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The available evidence also indicates that advertising is not a significant influence on the decision by young people to smoke. Indeed, advertising apparently is one of the least significant factors so far as smoking by teenagers is concerned.[27] A recent five-country study discloses that the incidence of smoking among young people is in fact *higher* in many places where advertising is banned or restricted than where it is not.[28]

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[27] Waterson, *supra*, at 26-27; *1986 Hearings, supra* (statements of Roger D. Blackwell and Dr. J. J. Boddewyn). Dr. Mortimer B. Lipsett, Director of NIH's National Institute of Child Health and Human Development, testified in 1983 that "[t]he most forceful determinants of smoking are parents, peers, and older siblings." *Smoking Prevention Education Act: Hearings on H.R. 1824 before the Subcomm. on Health and Environment of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 53 (1983). Even Michael Pertschuk, long an advocate of severe cigarette advertising restrictions, told a Harvard seminar in April 1983:

> "No one really pretends that advertising is a major determinant of smoking in this country or any other. * * * Smoking is such a complex form of behavior, and there are so many factors which affect smoking in this society—it is very difficult to isolate any particular one."

Tobacco Issues, Institute of Politics, Harvard University, April 27, 1983, Tr. 8-9.

[28] Int'l Advertising Ass'n, *Why Do Juveniles Start Smoking?* (J. Boddewyn ed. 1986). In Norway, for example, 11 years after a total advertising ban was imposed, the proportion of 7-15 year-olds who smoke regularly (13 percent) was nearly *twice* as high as in Spain (7 percent), where only minor advertising restrictions were in effect, and more than *four times* as high as in Hong Kong (3 percent), where no advertising controls existed. *Id.* at 9. In Norway, 36 percent of all 15 year-olds smoked in 1986, while in Spain the figure was 27 percent and in Hong Kong the figure was 11 percent. *Id.* at 11. *See also 1986 Hearings, supra* (statement of Dr. Boddewyn).

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Those responsible for the *Central Hudson* and *Posadas* challenges made no showing that the primary purpose and effect of the advertising in question was to promote competition rather than increase overall demand. They also made no showing that restricting such advertising was not an effective means of dampening demand. It therefore was perhaps reasonable for the majority simply to assume that the utility in *Central Hudson*, and the casino in *Posadas*, would not have challenged the advertising restrictions at issue unless those restrictions served to dampen demand.[29] But tobacco product advertising, like advertising in other mature, adult markets, plays an entirely different role. For the reasons noted, the Bradley/Stark proposals would serve only to impede competition rather than reduce demand. That is not a legitimate governmental purpose that would support severe restrictions on speech.[30]

2. *The Bradley/Stark Proposals Would Not Satisfy the Least Restrictive Means Element of the* Central Hudson *Test*

The Bradley/Stark proposals also would not satisfy the fourth and final prong of the *Central Hudson* test

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[29] *See Posadas*, 106 S. Ct. at 2977; *Central Hudson*, 447 U.S. at 569.

[30] In May 1986, a federal district court struck down Oklahoma's alcoholic beverage advertising ban under the Equal Protection Clause of the Fourteenth Amendment as an ineffective and therefore irrational means of achieving the state's asserted goals. *Oklahoma Broadcasters Ass'n* v. *Crisp*, No. CIV-81-1756-W (W.D. Okla. May 30, 1986). The Bradley/Stark proposals would suffer the same infirmity.

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—that restrictions on commercial speech be no "more extensive than is necessary" to serve the government's asserted interest. Notwithstanding *Posadas*, proponents would be required to defend the Bradley/Stark measures as "narrowly crafted" to serve their asserted purpose, and to establish that their goals could not adequately be served by any less restrictive means.[31] Obviously, restrictions designed to suppress truthful tobacco product advertising by making it inordinately expensive could not be defended as "narrowly crafted" or as the "least restrictive" means of achieving any legitimate governmental purpose. For if a perceived problem can be addressed by providing *more* information, that alternative is by definition less restrictive than an alternative *limiting* communication.[32]

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tion of all adult smokers in the United States (about 31 percent).

[31] *Zauderer*, 471 U.S. at 644, 647-49, 651-52 n.14; *accord, e.g., Bolger*, 463 U.S. at 80 (Rehnquist, J., joined by O'Connor, J., concurring in judgment); *Lowe*, 472 U.S. at 234-36 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in result).

[32] *See generally* Note, "The First Amendment and Legislative Bans of Liquor and Cigarette Advertising," 85 Colum. L. Rev. 632 (1985). In case after case, the Supreme Court has emphasized that "the preferred remedy is more disclosure, rather than less." *Bates*, 433 U.S. at 375. Time and again, the Court has applied Justice Brandeis's famous dictum that "the fitting remedy for evil counsels is good ones." *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (concurring opinion joined by Holmes, J.). *See Virginia State Board of Pharmacy*, 425 U.S. at 771 n.24; *Zauderer*, 471 U.S. at 650-52; *Central Hudson*, 447 U.S. at 570-71; *Linmark*, 431 U.S. at 97.

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For this reason, the denial of tax deductions for tobacco product advertising expenses, judged by the Supreme Court's long-established commercial speech doctrine, would fail the fourth prong of the *Central Hudson* test. The proposed denial of tax deductions would fail this prong of the *Central Hudson* test even if it did not result in eliminating such advertising altogether. For the test of a proposed restriction on commercial speech is not whether it is less restrictive than some more drastic measure but whether it is less restrictive than other approaches that would address its sponsors' concerns through increased information.[33]

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[33] Indeed, four Justices have expressed the view that if "more speech" cannot curtail demand for or use of a product the goverment's only recourse is to attack the perceived problem openly and directly—by forbidding or restricting use of the product—not by coerced silence. *See Central Hudson,* 447 U.S. at 573-79 (Blackmun, J., joined by Brennan, J., concurring in judgment); *id.* at 581 (Stevens, J., joined by Brennan, J., concurring in judgment); *Posadas,* 106 S. Ct. at 2980 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting).

Recently enacted federal legislation already requires cigarette advertising to carry four rotating health messages. This legislation also directs the Secretary of Health and Human Services to establish and carry out a broad program to educate the public with respect to "any dangers to human health presented by cigarette smoking." Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 3(a), 98 Stat. 2200 (1984) (codified at 15 U.S.C. § 1341(a)). Similar legislation has been enacted, even more recently, for smokeless tobacco products. Comprehensive Smokeless Tobacco Health Education Act, Pub. L. No. 99-252, § 2(a), 100 Stat. 30 (1986) (codified at 15 U.S.C. § 4401(a)). The Bradley/Stark proposals seem particularly ironic and ill-timed in view of this recent action by Congress.

The Supreme Court has yet to define the precise extent of the government's authority to require advertising to include

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C. The Significance of *Posadas*

In the light of this discussion, it should be apparent that Justice Rehnquist's opinion for the 5-4 majority in *Posadas* is unlikely to provide a basis for sustaining the Bradley/Stark cigarette advertising proposals. The *Posadas* decision cannot be understood clearly, or be reconciled with the Supreme Court's other commercial speech decisions, without appreciating its significance as a case from Puerto Rico—a jurisdiction with a "unique cultural and legal history" (106 S. Ct. at 2976 n.6) and a politically delicate relationship between Puerto Rico and the United States. As Hector Reichard, Jr., a former Attorney General of Puerto Rico, has observed, "the Supreme Court often says that it applies the same constitutional principles to us as it does to Congress and the States. But in reality it is far more reluctant to interfere in our affairs." [34]

Specifically, the Court in *Posadas* was confronted with a situation in which Puerto Rico, whose economy depends heavily on tourist dollars, had elected to stimulate this source of revenue by legalizing an activity that had long been illegal—casino gambling. But it did not want to encourage its own citizens to engage in that "sophisticated" activity. 106 S. Ct. at 2977 (quoting Superior Court opinion). Had economic circumstances not required Puerto Rico to try to attract tourists by making casino gambling legal, it is

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warnings or disclosures but it has made clear that some disclosure requirements may be impermissible. *Zauderer,* 471 U.S. at 651. *Cf. PG&E* v. *PUC,* 106 S. Ct. 903 (1986) (requirement that utility include messages of its adversaries in its monthly billing envelopes violates the First Amendment).

[34] Statement to the ABA House of Delegates on behalf of the Joint ABA/ANPA Task Force, Feb. 16, 1987, p. 3.

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unlikely that it would have decriminalized the activity at all. The *Posadas* majority was understandably reluctant to upset this arrangement. To suppose that a majority of the Court would harbor a comparable reluctance when reviewing legislation designed to suppress speech throughout the United States is to sever *Posadas* from its essential moorings.[35]

Moreover, the advertising restrictions at issue in *Posadas* were restrictions in name only. Since the restrictions focused on the audience to whom casino-gambling advertisements were "addressed," and not the audience they reached, the Court in *Posadas* was not in fact faced with advertising controls that, if approved, actually would keep people in ignorance.[36] The illustory quality of the *Posadas* restrictions undoubtedly goes far to explain the majority's readiness to defer to Puerto Rico's judgment as to the appropri-

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[35] The majority's special reluctance to interfere in Puerto Rico's affairs is illustrated both by its pointed reference to Puerto Rico's "unique cultural and legal history" (106 S. Ct. at 2976 n.6) and by its willingness to accept Puerto Rico's assertion that there was no inconsistency in the Commonwealth's decision to allow advertising for horse-racing, cockfighting, small games of chance at *fiestas*, and the lottery—while forbidding casino-gambling advertising. Puerto Rico justified this anomalous posture on the ground that those less "sophisticated" forms of gambling "have been traditionally part of the Puerto Rican's roots." 106 S. Ct. at 2977 (quoting Superior Court opinion). It is scarcely conceivable that the *Posadas* majority would have accepted such a patronizing assertion from New Jersey or Nevada—or from Congress.

[36] Counsel for Puerto Rico stated during oral argument in the Supreme Court that casino advertising in a Spanish-language daily with 99-percent local circulation would be permitted so long as the advertising "is addressed to tourists and not to residents." Oral Arg. Tr. 26.

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ateness of those restrictions. Because the *Posadas* restrictions by their nature could not manipulate consumer behavior by suppressing information, that aspect of the majority's opinion in *Posadas* represents at bottom a brand of dicta—unusual dicta but dicta nonetheless.

Finally, as discussed above, there was no showing in *Posadas* that casino gambling advertising addressed to Puerto Ricans would serve any function except to stimulate overall gambling activity. It was not argued that such advertising simply constitutes a means by which one casino seeks to attract customers from other casinos and keep its existing patrons loyal. In such circumstances it was perhaps understandable for the *Posadas* majority to assume that the casino in that case would not have litigated the case "all the way" to the Supreme Court (106 S. Ct. at 2977) unless the advertising restrictions in question would operate to reduce demand—and to assume that the Puerto Rico Legislature, in enacting the restrictions, shared this view. The Court in *Posadas* did not face a record—as it would in the case of tobacco product advertising—demonstrating that the advertising at issue served primarily as a vehicle for competition rather than to promote demand.[37]

[37] In sustaining the casino-gambling advertising restrictions, the *Posadas* majority pointed to other limited advertising restrictions, including the ban on cigarette advertising in the electronic media. 106 S. Ct. at 2980 n.10. Justice Rehnquist cited these other limited restrictions to illustrate his suggestion that a legislature may curb advertising of products or services whose sale it could prohibit. However, this suggestion was *dicta,* unnecessary to the holding in the case. *See* Congressional Research Service, "The Proposed

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Professor Philip B. Kurland of the University of Chicago Law School has cautioned that *Posadas* should not be relied upon because its reasoning, if taken at face value, "is so inconsistent with everything that has gone before."[38] His caution is well-founded. If one interprets the narrow majority opinion in *Posadas* as deciding that the government has virtually unlimited power to suppress truthful speech concerning lawful products and services as long as there is no constitutionally protected right to purchase the products or services themselves, then almost all of the Court's commercial speech decisions since 1976 would now be open to reconsideration. Such analysis would militate in favor of sustaining, not invalidating, the advertising restrictions at issue in those cases, since the underlying activity in most of the cases was not constitutionally protected.

As Assistant Attorney General Charles J. Cooper has noted, "it is unusual for the Court to effect such

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Prohibition on Advertising Tobacco Products: A Constitutional Analysis," pp. 15-16, 19 (Dec. 30, 1986). Moreover, the suggestion has been widely criticized as untenable by the most eminent constitutional scholars. *E.g., N.Y. Times,* Feb. 22, 1987, § E, p. 9 (interview with Professor Philip B. Kurland); Professor William Van Alstyne, letter dated Jan. 25, 1987, to Eugene Thomas, ABA President, and ABA Board of Governors. Justice Rehnquist also cited the cigarette advertising ban in the electronic media as an example of a case in which the legislature had "conclude[d]" that *more speech* would not curtail consumption of a controversial product or service. 106 S. Ct. at 2978. As discussed above, however, the available evidence, gathered in the 17 years since Congress banned cigarette advertising from the electronic media, demonstrates that *bans* do not curtail consumption of tobacco products.

[38] Interview, *N.Y. Times,* Feb. 22, 1987, § E, p. 9.

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a dramatic break with precedent without some explanation." [39] The Court in *Posadas* did not purport to overrule its prior cases in the area. To the contrary, the majority expressly reaffirmed the *Central Hudson* principles, which assure protection of the basic values that led the Court to extend the First Amendment's guarantees to commercial speech in 1976. Absent a clear statement from the Court that *Central Hudson* is no longer good law, the majority opinion in *Posadas* must be viewed in the sensitive and special context presented by Puerto Rico's casino-gambling advertising restrictions. As Justice Rehnquist himself stated in an analogous context:

> "Since the court saves harmless from its present opinion our prior cases in this area, * * * it may be fairly inferred that it does not intend the results which might otherwise come from a literal reading of its opinion." *Bigelow*, 421 U.S. at 836 (dissenting opinion).

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In sum, the Bradley/Stark proposals would constitute a forbidden attempt by government, through manipulation of the tax code, to influence consumer choice by restricting the flow of truthful information about lawful products, irrationally impeding the in-

[39] Letter from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Feb. 9, 1987, to Henry G. Miller, Past President, New York State Bar Association, p. 1. For this reason, the Justice Department also has counseled against relying on *Posadas* to support a tobacco product advertising ban. The Court sometimes may chip away at its precedents but when the Court intends to effect a wholesale revision of its constitutional jurisprudence it says so expressly. *See, e.g., Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

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telligent exercise of consumer choice. The proposals also would likely be held to fail the literal terms of the four-part *Central Hudson* test, for it could not be shown that the proposals would directly and effectively serve the government's asserted interest or would do so in the least restrictive way.

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